DEC 19 1990

No. 89-1632

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HODARI D.,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

Paul L. Gabbert
2115 Main Street
Santa Monica, CA 90405
(213) 399-3259
Attorney for Amicus Curiae, California Attorneys for Criminal Justice

BEST AVAILABLE COPY

36 pp

QUESTIONS PRESENTED

1. Was Respondent seized within the meaning of the Fourth Amendment?

2. Was the single rock of cocaine correctly suppressed?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE ISSUE OF REASONABLE CAUSE TO DETAIN HODARI D. IS NOT BEFORE THE COURT	5
II. OFFICER PERTOSO'S BLOCKING OF RESPONDENT'S PATH WAS AN UNREASONABLE SEIZURE	12
A. Seizure of the person defined	12
B. The Court of Appeal correctly applied the Mendenhall - Chesternut seizure definition to the undisputed facts and determined that Respondent was detained	22
III. RESPONDENT'S ABANDONMENT OF THE COCAINE WAS DIRECTLY CAUSED BY THE UNREASONABLE POLICE CONDUCT	28
CONCLUSION	29

TABLE OF AUTHORITIES

Cases — Page

Alabama v. White, __ U.S. __, 110 S.Ct. 2412, 2417 (1990) 19

Arizona v. Hicks, 480 U.S. 321, 326 & n.* (1987) 7, 10, 14, 20

Bell v. Wolfish, 441 U.S. 520, 531 n.13 (1979) 10

Brower v. County of Inyo, __ U.S. __, 109 S.Ct. 1378, 1383 (1989) . . . 3, 4, 19, 26

Brown v. Illinois, 422 U.S. 590, 603-604 (1975) 29

Byars v. U.S., 273 U.S. 28, 33 (1927) 21, 23

Ins. v. Delgado, 466 U.S. 210, 215 (1984) 16, 27

Katz v. U.S., 389 U.S. 353 (1967) . . 13, 14

Kibbe v. Springfield, 777 F.2d 801, 802-803 (1st Cir. 1985) 26

Knetsch v. United States, 364 U.S. 361, 370 (1970) 10

Maryland v. Macon, 472 U.S. 463, 469 (1985) 13, 14

Michigan v. Chesternut, 466 U.S. 210, 108 S.Ct. 1977, 1978 (1988) . 3, 4, 16, 17, 20-22, 25

Cases Continued — Page

People v. Jones, 209 Cal.App.3d 725, 727-728 (1989) 23

People v. Superior Court (Kiefer) 3 Cal.3d 807, 827-828 n. 13 (1970) 19

Rogers v. Lodge, 458 U.S. 613, 623 (1982) 6

Sibron v. New York, 392 U.S. 40, 58 (1968) 10

Steagald v. United States, 451 U.S. 204, 210 & n.5 (1981) 8

Terry v. Ohio, 392 U.S. 1, 15-17 (1968) 15, 17, 20

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981) 9

United States v. Mendenhall, 446 U.S. 544, 554 (1980) 16, 21, 22

United States v. Nixon, 418 U.S. 683, 702 (1974) 6

United States v. Place, 462 U.S. 696, 706 (1983) 14

United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963) 25

United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988) 14

Cases Continued — Page

Wong Sun v. United States, 371 U.S. 471, 486-488 (1963) 29

Constitution

Fourth Amendment . . . . . passim

Other

Welf. & Inst. Code § 700.1 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 89-1632

THE PEOPLE OF THE STATE OF CALIFORNIA,
PETITIONER,

v.

HODARI D.,
RESPONDENT

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

California Attorneys for Criminal Justice (CACJ) is a statewide criminal

defense organization composed of approximately 2,600 lawyers from various states as well as law students and related professionals active in the defense of criminal cases.

One of the objectives of the organization is to protect and insure by rule of law those individual rights guaranteed by the United States and California Constitutions and to resist all efforts made to curtail these rights.

Among the standing committees of the organization is an Amicus Curiae Committee. The tasks of this committee are to identify cases and issues involving those rights which the organization seeks to protect and to submit briefs in those cases where it is believed they will assist the Court in the proper administration of criminal justice.

SUMMARY OF ARGUMENT

1. The question left open by the Court in Michigan v. Chesternut, 466 U.S. 210, 108 S.Ct. 1977, 1978 (1988) -- "whether the act of fleeing, by itself, was sufficient to constitute reasonable suspicion justifying the seizure" -- is not before the Court. Two lower courts found and Petitioner conceded below and here that there was no reasonable suspicion to detain Respondent. These dual findings and Petitioner's concessions bind this Court. The attempt by Petitioner's amici curiae, to resurrect this issue, not raised by the parties, must fail.

Thus, even if the Court concludes, as Respondent and amicus strongly contend it should not, that the Court of Appeal erred in determining that Respondent was detained, that ends the matter. Id. cf. Brower v. County of Inyo, __ U.S. __, 109 S.Ct. 1378, 1383 (1989)

(Opinion of Stevens, J., with whom Brennan, J., Marshall, J., and Blackmun, J., join, concurring in the judgment).

2. Conversely, if a plurality of the Court determines that the Court of Appeal correctly concluded Respondent was seized, the only remaining question is whether the single cocaine rock was properly suppressed. The Court need not, and amicus submits should not, yield to Petitioner's and his amicis' urgings to: (1) overturn the Mendenhall - Chesternut seizure definition in favor of one based on antiquated property law concepts, eighteenth century dictionaries and dicta in Brower v. County of Inyo, supra, 109 S.Ct. at 1380-1382 and make actual restraint or so-called "stationary acquiescence" the sin qua non for seizure; (2) redefine reasonable suspicion as flight from police; and (3) add an

"inevitable-illegal-search" tier to the fruit of the poisonous tree doctrine.

ARGUMENT

I.

THE ISSUE OF REASONABLE CAUSE TO DETAIN HODARI D. IS NOT BEFORE THE COURT

Respondent's motion below (Welf. & Inst. Code § 700.1) sought to suppress:

> All physical (and intangible) evidence seized or obtained as a result of the following deprivations of the minor's liberty and right to privacy, including that resulting from: the minor's detention. Joint Appendix (J.A.) 3.

The trial court denied the motion, but found that the police had no reasonable suspicion to detain Hodari D. before he discarded the single rock of cocaine (J.A. 54-55, 73, 99). In reviewing the denial of the motion to suppress, the Court of Appeal

of the State of California accepted this finding by the trial court and held it was supported by substantial evidence. The court correctly observed that, "[s]ince only the police officers testified in this case, the facts are undisputed." J.A. 131. The court then independently reviewed and upheld the trial court's finding under the Constitutional standard of reasonableness. J.A. 131.

The trial court's finding essentially rests on its determination of factual issues. See United States v. Nixon, 418 U.S. 683, 702 (1974). Therefore, this Court will not overturn that finding unless it has no support in the record. Ibid. Traditionally, this Court has been reluctant to disturb findings of fact in which two courts below have concurred. Rogers v. Lodge, 458 U.S. 613, 623 (1982).

In the Court of Appeal, Petitioner (Respondent below), Attorney General of the State of California, did not dispute the trial court's finding and rested his case instead on the argument that no detention had occurred before the rock of contraband was discarded. J.A. 138. Here, the Attorney General did not present the issue of reasonable cause to detain Hodari D. in his Petition for Writ of Certiorari or in his Brief[1].

On this record, it could not be plainer that Petitioner's concession, and the identical findings concurred in by two courts below, are binding on this Court. Arizona v. Hicks, 480 U.S. 321, 326 & n.* (1987) (Arizona's concession that the police did not have probable cause to search precluded consideration by this Court whether the

[1] But see Brief for Petitioner at pp. 38 n.4, 39-46.

probable cause standard was satisfied). See Steagald v. United States, 451 U.S. 204, 210 & n.5 (1981) (Government's explicit concessions regarding "standing" in the Fourth Amendment context held binding in this Court).

Despite this record and the prohibition against amici curiae presenting additional questions or arguments not made by the parties[2] (e.g., United Parcel Service, Inc.

---

[2] Amicus curiae, Appellate Committee of the California District Attorneys Association (Appellate Committee), erroneously contends that the issue of reasonable suspicion for detention was raised by Respondent in this Court. Amicus cites the entire argument section of Respondent's Brief. This general citation to Respondent's entire brief self-servingly misstates: Questions Presented (pp. I, 8, 17) and their discussion (pp. 8-23).

The reason for this mischaracterization is that Amicus Appellate Committee's entire brief is devoted to trying to prove on review before this Court that the facts articulated by the police officers, especially the flight of the suspects, provided reasonable suspicion to detain them. (Br. pp. 3, 5-20).

v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell

Although amicus curiae United States does not attempt to present the question of reasonable suspicion to detain Hodari D. (Br. (I)), acknowledges that California has not raised the reasonable suspicion argument in its petition, and states for that reason amicus has not discussed it in its brief (Br. p. 4, n.2), reference to and commentary on this issue nevertheless do appear in its brief (Br. p. 4, n.2; 7).

Amicus curiae, Criminal Justice Legal Foundation devotes the bulk of its brief (Br. pp. 3-15) to attempting to establish that the minors' "flight justified a stop under Terry v. Ohio" (Br. p. 3).

Amicus curiae Wayne County Prosecuting Attorney (Wayne County) also discusses in the last section of its argument (Br. pp. 27-34) several points, "unnecessary to the resolution of this case" (Br. p. 27), including whether Respondent's flight provided reasonable suspicion for his detention.

Thus, all amici supporting Petitioner, except United States, directly seek review of an issue resolved against Petitioner by two lower courts, conceded by Petitioner in the Court of Appeal, not raised by the parties in this Court and upon which certiorari was not granted. United Parcel Service, Inc. v. Mitchell, 451 U.S. at 60, n.2.

v. Wolfish, 441 U.S. 520, 531 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1970) (all refusing to consider issues not raised in this Court by the parties)), Amicus Appellate Committee characterizes Petitioner's concession as an "apparent" one and relies on Sibron v. New York, 392 U.S. 40, 58 (1968) to support the contention that this Court is not bound by it. Br. at pp. 4-5. In light of Justice Scalia's majority opinion in Arizona v. Hicks, supra 480 U.S. 321 (concurred in by Justice White, id. at 329), the language in Sibron v. New York, supra, 392 U.S. at 58, cited and relied on by amicus Appellate Committee is of questionable continuing vitality.

In any event, the facts and procedural posture of Sibron are inapposite. In Sibron, the district attorney for one New York county initially tried to justify a search on the

basis of a New York statute. He then belatedly confessed error in this Court. Id. at 47-48, 58. In an opinion by Chief Justice Warren, the Court declined to overturn a judgment of New York's highest court interpreting a state statute on Constitutional grounds based solely upon a "confession of error on behalf of the entire state, executive and judicial branches . . . made, not by a state official, but by the elected legal officer of one political subdivision within the state." Id. at 58.

Here, no statute is in issue. The concession does not affect the judgment and was made in the Court of Appeal of the State of California over a year ago by California's highest law enforcement officer. The issue was not raised by the State in this Court. Now, a deputy district attorney from one of fifty-eight counties in California, writing

for amicus Appellate Committee seeks to resurrect the point. This Court should reject this attempt by these three amici for Petitioner to use this case as a vehicle to decide one of their law enforcement agenda items.

II.

OFFICER PERTOSO'S BLOCKING OF RESPONDENT'S PATH WAS AN UNREASONABLE SEIZURE

A. Seizure of the person defined

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." (Emphasis added). Amici for Petitioner have redefined the term seizure and analyzed when it occurs without adequately distinguishing among the natures of the things seized. While there are not different standards depending upon what is seized, the

item, thing or person is a circumstance which must be considered in assessing whether a seizure has occurred.

The test for determining whether an inanimate, tangible object is seized is whether there has been a meaningful interference with (someone's) possessory interest. See Maryland v. Macon, 472 U.S. 463, 469 (1985).

The test for a seizure of intangible information focuses on the reasonable expectations of privacy and personal security of the person contesting the search and seizure. Katz v. U.S., 389 U.S. 353 (1967). In Katz, the illegal seizure of intangible information in the form of the content of a telephone conversation, did not turn on any physical intrusion or physical control over

Katz or his electronically monitored and recorded words. 389 U.S. at 353-357.[3]

---

[3] The act of obtaining intangible information such as viewing and writing down stereo equipment serial numbers in Arizona v. Hicks, supra, 480 U.S. at 323, viewing of the interior of a room in United States v. Winsor, 846 F.2d 1569 (9th Cir. 1988) (en banc), overhearing the words spoken in the telephone conversation in Katz, and a canine smelling the scent of contraband in United States v. Place, 462 U.S. 696, 706 (1983), all involve the acquisition of information by human or nonhuman senses. The process of obtaining this information does not fit neatly into the property-law based test for the seizure of a tangible object. See Maryland v. Macon, supra, 472 U.S. at 469.

An individual's reasonable personal security and privacy interests in avoiding the involuntary disclosure of such intangibles as the content of a telephone conversation, his luggage or the nature of consensual activity in the home are frequently far greater than the relatively insignificant interference with whatever property interest one may have in the same information. The analysis of personal privacy interests in intangible information comports with the Court's Fourth Amendment decisions since Katz which, focus on the protection of people, not places or things, from all varieties of unreasonable police conduct.

The perspective necessarily shifts when a person becomes the object of official inquiry. The definition of an arrest as a seizure of the person (Terry v. Ohio, 392 U.S. 1, 15-17 (1968)) is consistent with eighteenth century English and American notions of the actual physical possession of tangible objects and literal restraint including complete curtailment of the person's liberty and freedom of movement by custodial arrest and incarceration. However, comparisons based on seizures of tangible property break down when intangibles and restraints on liberty short of actual arrest are the objects of police conduct.

A person is seized "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . .." (Emphasis added.) Terry v. Ohio, supra, 392 U.S. at

19, n.16. Thus, the sensibility of the person seized is necessarily included in the Court's formulation of when this type of seizure occurs. A person is seized, within the meaning of the Fourth Amendment, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Footnote omitted.) (Emphasis added.) United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Opinion of Stewart, J.). Accord Ins. v. Delgado, 466 U.S. 210, 215 (1984); Michigan v. Chesternut, 466 U.S. 215, 108 S.Ct. at 1979.

"[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." (Emphasis added.) U.S. v. Mendenhall, supra, 446 U.S. at 573.

By definition, the Court's reasonable person seizure test necessarily includes the context in which the reasonable person finds himself. The Court's consistent contextual focus on the **setting** and the type of **police conduct** emphasizes a flexible, situational approach to the "protean variety" of potential police encounters with citizens. Terry v. Ohio, 392 U.S. at 15. Contrary to the identical, previously rejected arguments readvanced here by Petitioner and his amici, Wayne County, Criminal Justice Legal Foundation, and United States (Michigan v. Chesternut, supra, 108 S.Ct. at 1979), the Court should not abandon this time tested approach in favor of a rigid, "bright-line" rule making actual physical restraint the sin qua non of personal seizures.

Petitioner and his amici, Wayne County, United States and Criminal Justice Legal

Foundation, have confused seizures of things with seizures of persons. In arguing that a seizure of a person occurs only when one's freedom of movement is literally physically retrained, Petitioner and amicis' proffered redefinition of seizure unnaturally and invalidly restricts the scope of permissible citizen responses to unwanted and unwarranted police contacts to one: so-called "stationary acquiescence." Any other reasonably foreseeable human response to intimidating or coercive police behavior is not, by their definition, a seizure.

This approach turns the Fourth Amendment on its head. The citizen, whose liberty and personal security the Fourth Amendment was designed to protect, is subordinated to a rigid, mechanistic formula claimed to promote

crime fighting.[4] This essentially property-

---

[4] On the street, indeed if not at some police roll calls, this new definition in conjunction with the proffered criterion of flight alone as reasonable suspicion to detain (advanced here by amicus Wayne County, Br. at pp. 4-16), will all too quickly degenerate into: "Make 'em run. If they drop anything incriminating along the way it is: (1) off the street and (2) admissible in court. If you catch them before they discard anything incriminating, whatever the patdown search turns up is also admissible in court."

The proposed new definitions of seizure and reasonable suspicion are unworkable. Although amicus has stated, see ante at pp. 5-12, and re-emphasizes here, that the question of reasonable suspicion to detain Respondent is not before the Court, in view of the dicta in Brower v. County of Inyo, supra, 109 S.Ct. at 1383, we note that flight alone as the standard for reasonable suspicion provides the "overzealous and unscrupulous officer" with a virtually irrefutable method for creating chases and "writing-in" reasonable suspicion to stop and frisk. See Alabama v. White, __ U.S. __, 110 S.Ct. 2412, 2417 (1990) (Stevens, J., Brennan, J., and Marshall, J. dissenting); See People v. Superior Court (Kiefer) 3 Cal.3d 807, 827-828 n. 13 (1970) (furtive gesture alone insufficient for probable cause and easily fabricated).

based definition of seizure is compatible with the literal acquisition of inanimate tangible objects. It is discussed at length and clearly favored by amicus Wayne County. It also mirrors the definition penned by eighteenth century lexicographers. Amicus United States, notes its application to the in rem seizure of ships in admiralty actions. However, this definition ignores the spirit and purpose of the Fourth Amendment as consistently interpreted by the Court from Terry through Chesternut.

A search involving the movement of an object only a few inches, and uncovering nothing of any great personal value, "is much more than trivial for purposes of the Fourth Amendment".... Just as "[a] search is a search" ... (Arizona v. Hicks, supra, 480 U.S. at 325), so a seizure (of a person) is a seizure whenever a reasonable person would

have believed that he was not free to leave (Mendenhall, 446 U.S. at 554) regardless of whether varying incremental restraints on his present freedom of movement cause him to change speed, direction or to actually stop.

The salient protection of the Fourth Amendment in this context is the effect of the "misuse of power" (Byars v. U.S., 273 U.S. 28, 33 (1927)) on the state of mind of the reasonable person "in view of all the circumstances surrounding the incident" . . . (Chesternut, 108 S.Ct. at 1979) not whether a person has literally come to a stop. The Court's existing test is adequate for determining the voluntariness of the person's reaction to an express or implied assertion of authority. It is the coercive or intimidating effect of authority on the reasonable person's mind as objectively determined from all of the surrounding circumstances, not the nature or

magnitude of a particular individual's physical reaction, that is at the heart of the Fourth Amendment's protection of personal security against misuse of power.

B. **The Court of Appeal correctly applied the Mendenhall - Chesternut seizure definition to the undisputed facts and determined that Respondent was detained**

On April 18, 1988, Officer Pertoso ran up Foothill Boulevard toward Respondent. Hodari D., who was also running, looked forward and saw the officer, clad in a blue jacket with the word "POLICE" on the front, running directly at him. J.A. 126, 127, 133. Pertoso cut off Respondent, confronted him head on and closed to within eleven feet. J.A. 134. Respondent looked startled. J.A. 128. He then discarded on the sidewalk the

single loose rock of cocaine that was later ordered suppressed. J.A. 128.[5]

Respondent's startling confrontation with Officer Pertoso made a lasting impression upon him.[6] Following the trial court's denial

---

[5] Office McColgin was not far behind. Although the record is silent on this point, it is noteworthy that the previous Fall, (October 12, 1987) the same officer, Brian McColgin, of the Oakland Police Department Drug Task Force, choked another suspect charged with the same offense as Respondent. People v. Jones, 209 Cal.App.3d 725, 727-728 (1989). In Jones, the trial court's order suppressing the evidence obtained by McColgin's application of an illegal choke hold to Jones' throat was affirmed on appeal (Id. at 731) on April 13, 1989 by the same California Justices who later signed the opinion in this case. While in Jones the evidence was suppressed, it is fair to say that the word on the street in Oakland was not.

[6] Amicus United States incorrectly assumes, without citation to the record (Br. p. 19), that the Court of Appeal suppressed the single rock Officer Pertoso saw Respondent discard **and** fifteen additional rocks subsequently located on the street after his arrest. While these fifteen rocks were admitted into evidence over Respondent's relevancy objection in

of the motion to suppress, it declined to accept Respondent's proffered admission that he possessed one rock of cocaine because he told the Court that Pertoso had threatened him, "just by his looks. He looked at (Respondent) real mean." Respondent stated that if he didn't admit in Court (to possessing the contraband), and if he was seen on the street again by Officer Pertoso, Pertoso "would be mad at (him)." J.A. 98.

On this record, the Court of Appeal correctly applied existing law, ruled that Respondent had been seized and wrote:

> We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit

---

the trial court after the motion to suppress was denied (J.A. 96), their admissibility was not argued at the suppression hearing. J.A. 46-94. They were not suppressed by the Court of Appeal J.A. 140-144. They too are not before the Court.

> as Officer Pertoso did not pursue, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980). J.A. 134.

Pertoso's intentional blocking of Respondent's chosen path of departure away from the police with the word "POLICE" prominently displayed in full view across his chest was assertive conduct intended as a substitute for speech.[7] See United States v. Ross, 321 F.2d 61, 69 (2d Cir. 1963). Display of the word "POLICE" at a distance of eleven feet, in this context, signifies the verbal

---

[7] Pertoso's subjective intent to "find out who (the youths) were and what their purpose was for being ... in the area" (J.A. 44), is irrelevant. Pertoso did not even attempt to convey his intent to Respondent whom he confronted. Chesternut, 108 S.Ct. at 1980 n.7.

command: "STOP". This police action, although neither oral nor aural, communicates as clearly as a stop sign. Pertoso's conduct unmistakably conveyed his statement that Respondent was no longer free to continue on his way or to leave the officer's presence. This was a governmental termination of freedom of movement through means intentionally applied. Brower v. City of Inyo, 109 S.Ct. at 1381 (dictum).

Just as raising one's umbrella communicates to all within view, the statement: "It is raining," regardless of the actor's actual subjective intent, Pertoso's intentional blocking of Respondent's exit expressed the command to stop as clearly and effectively as spoken words, or red lights or a siren on a police patrol car do. See Kibbe v. Springfield, 777 F.2d 801, 802-803 (1st Cir. 1985), cert. dism'd., 480 U.S. 257

(1987). The latter universally denote that one's present freedom of movement, in one's chosen direction and at one's desired speed, has been unilaterally rescinded, effective immediately, by the non-verbal assertion of official authority.

Pertoso's threatening conduct was coercive and intimidating both in the field and in court. The necessary and sufficient conditions for a "seizure" were satisfied. In this situation, no minor on an Oakland street at night could reasonably feel that he was free to leave the officer's presence and continue on his way. See Chesternut, 108 S.Ct. at 576 (quoting INS v. Delgado, supra, 466 U.S. at 216).

III.

RESPONDENT'S ABANDONMENT OF THE COCAINE WAS DIRECTLY CAUSED BY THE UNREASONABLE POLICE CONDUCT.

Amicus relies on Respondent's arguments. We write here only to correct one fallacy in amicus, United States' brief.

United States reasons that if the seizure occurs at the time the officers first illegally and unsuccessfully order the individual to stop the evidence ultimately obtained will be suppressed "even if the events that occur between the time of the officers' command to stop and the eventual apprehension of the individual give the officers ample justification for the seizure." Br. p. 6. This conclusion is invalid. The outcome depends on the source of the "justification for the seizure" and whether the taint of the initial unlawful conduct was

attenuated by an intervening act including one by the suspect himself. Wong Sun v. United States, 371 U.S. 471, 486-488 (1963); Brown v. Illinois, 422 U.S. 590, 603-604 (1975). Here, there was simply no time for attentuation.

CONCLUSION

The judgment of the Court of Appeal of the State of California, First Appellate District should be affirmed.

December, 1990 Respectfully submitted.

PAUL L. GABBERT
Attorney for Amicus Curiae,
California Attorneys for
Criminal Justice